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**Nos. 01-1118, 01-1119**

In the Supreme Court of the United States

JOSEPH SCHEIDLER, et al., Petitioners,

*v.*

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Respondents.

OPERATION RESCUE, Petitioner,

*v.*

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Respondents.

On Writs of Certiorari To The United States Court of Appeals For The Seventh Circuit

# BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than ten thousand members nationwide and twenty-eight thousand affiliate members in fifty states, including private criminal defense lawyers, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. The NACDL is committed to preserving fairness within the American criminal justice system. The NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's objectives are to

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no party other than counsel for amicus authored this brief in whole or in part, and no person or entity, other than amicus and counsel, have made a monetary contribution to the preparation or submission of this brief. The petitioners and respondents have consented to the filing of this brief, and their letters of consent have been filed with the Clerk of the Court, pursuant to Supreme Court Rule 37.3(a).

ensure that appropriate measures are taken to safeguard the rights of all person involved in the criminal justice system and to promote the proper administration of justice.

This brief is limited to Question 1 on which certiorari was granted, concerning the meaning and application of the Hobbs Act, 18 U.S.C. § 1951.

## SUMMARY OF ARGUMENT

The Hobbs Act, 18 U.S.C. § 1951(a), punishes by up to 20 years' imprisonment actual or attempted extortion, or conspiracies to commit extortion, that impede commerce. The definition of "extortion" in § 1951(b)(2) requires proof of "obtaining of property from another." Despite these seemingly clear words, the court of appeals in this case held that it is enough if there is a loss to, or interference with the rights of, the victim, and the court included abstract and intangible interests within the definition of property, such as the right to conduct a business. Thus, the court eliminated any requirement of proof of a larceny-type offense.

The Hobbs Act construction that the court of appeals adopted is unjustified and should be rejected. Most simply, it cannot be squared with the statutory language, and federal courts should not define crimes more broadly than they are defined by the actual words

that Congress employed. The court of appeals' broad conception of extortion under the Hobbs Act seems to have crept into the court's decisions without reasoned consideration of the statutory language and is not entitled to deference. This expansion of the Hobbs Act would allow it to reach all sorts of mundane crimes of violence whose prosecution should be left to state law or narrower federal criminal prohibitions.

## ARGUMENT

### THE PLAIN MEANING AND COHERENT APPLICATION OF THE OFFENSE OF "EXTORTION" WITHIN THE MEANING OF THE HOBBS ACT, 18 U.S.C. § 1951, BOTH REQUIRE PROOF (A) THAT THE ALLEGED OFFENDER TOOK PROPERTY OF THE VICTIM, AND (B) THAT THE PROPERTY WAS OF A KIND THAT IS CAPABLE OF BEING TAKEN BY ANOTHER.

Chief Justice Marshall wrote in *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." Whatever else this principle stands for, it must mean that common words in a federal criminal statute should not be stretched and distorted to extend the reach of a statute further than Congress's language itself fairly takes it.

A stranger to these proceedings or to the federal criminal law who for the first time read the Hobbs Act, 18 U.S.C. § 1951, would have no trouble understanding

the essential nature of the offense. Section 1951(a) states:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

These words focus on acts or threats of robbery or extortion, or attempts or conspiracies to commit those offenses. The exact circumstances when robbery or extortion becomes a Hobbs Act violation may be less than clear to a reader encountering these words for the first time, but the necessary tie to robbery and extortion is unmistakable.

Section 1951(b)(2) then defines "extortion." It is "the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence, or fear or under color of official right." 18 U.S.C. § 1951(b)(2). The essential meaning of these words is equally clear. Property must be ***obtained***—a perfectly common, generally understood word, meaning taken or acquired—***from another***, which

also is a perfectly clear concept.[2] The words of the statute make clear the essential meaning of the acts constituting "extortion." And from that meaning, it follows that the property that can be the object of an act of extortion, or an extortionate threat, plan, etc., is "property" that is susceptible to being obtained or acquired from another. An abstract property interest that may be lost, devalued, or destroyed, but not transferred to or appropriated by another, cannot be the object of extortion. A recent examination of the Hobbs Act and the historical meaning of "extortion" also reached the conclusion that "obtaining" property requires that someone acquire the property, not just that it be lost, impaired, or destroyed. Brian J. Murray, *Note, Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 704-712 (1999).

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2 *Cf.* Brief of the United States, at 11-12, in *Cleveland v. United States* (No. 99-804). That case involved the federal mail fraud statute, 18 U.S.C. § 1341, an offense whose definition includes the phrase "for obtaining money or property." The United States' brief cites various modern and older dictionary definitions of the verb "to obtain," all of which incorporate the idea of acquiring, not destroying or impairing, something. *E.g.*, *Webster's New International Dictionary* 1485 (1917) (defining "obtain" as "[t]o get hold of by effort; to gain possession of; to procure; to acquire, in any way") (first definition).

Clear though these points may seem, the Seventh Circuit held that destroying or impairing property may suffice for a Hobbs Act conviction. The court of appeals also held that an abstract property interest that is insusceptible of being taken by another may be the object of extortion. Petitioners asserted in the court of appeals that the property interests asserted by respondents here, *viz.*, "the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses," could not constitute "property" within the meaning of "extortion" as defined in 18 U.S.C. § 1951(b)(2). *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001). Petitioners also argued that they "did not 'obtain' that property; they merely forced the plaintiffs to part with it," and that this does not constitute "extortion." *Id.*

The Seventh Circuit was casual and dismissive in rejecting these arguments. The court merely referred to "a long line" of its own precedent "that intangible property such as the right to conduct a business" suffices, *id.* (citing *United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)), and that "'an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.'" *Id.* (quoting *United States v. Stillo*, 57 F.3d 553, 559 (7th Cir.

1995)). The court of appeals did not try to show how the actual statutory language could bear these meanings.

In fact, there is no "long line" of precedent supporting the lower court's decision. Even in the Seventh Circuit, the pedigree for the court's construction of the Hobbs Act rules is unimpressive. In *Anderson*, the court of appeals found that there was sufficient evidence to support a Hobbs Act conviction. That case involved a kidnaping, accompanied by threats, committed to persuade a physician to stop performing abortions. 716 F.2d at 450. But that decision does not fairly support the court's Hobbs Act construction here. The defendant in *Anderson* challenged only the evidence of obstruction of commerce. He did not challenge the evidence for failure to show an actual taking of property and did not challenge the kind of the property involved. *Id.* Thus, the decision is not really on point. And in sustaining Anderson's conviction, the court of appeals cited no prior decisions of its own or of any other court.

*Stillo* also is weak precedent for the Hobbs Act construction that the court of appeals applied in the present case. There, the court affirmed racketeering convictions predicated upon the Hobbs Act. 57 F.3d at 559. But tangible property, namely money, undoubtedly was taken; the case involved cash bribery in the Cook County, Illinois court system. *Id.* at 555-57. A defendant argued that proof of extortion was insufficient, but the

court found that "as a factual matter the evidence was more than sufficient for the jury to find that the Stillos conspired to extort money . . . ." *Id.* at 559.

The court in *Stillo* did add the gratuitous comment that "an extortionist can violate the Hobbs Act without ever seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *Id.* But the point was utterly unnecessary. And the only prior support that the court cited was *United States v. Lewis*, 797 F.2d 358 (7th Cir. 1986), *cert. denied*, 479 U.S. 1093 (1987). *Lewis*, in turn, involved attempted extortion of $1 million from the manufacturer of the pain reliever Tylenol by threat of poisoning Tylenol capsules with cyanide. *Id.* at 362-63. This obviously shows classic extortion. The only unusual wrinkle was that the defendant claimed that his true motive was to harm his wife's former employer, into whose bank account he instructed the manufacturer to deposit the funds. *Id.* at 363-64. The court held there was sufficient evidence of extortionate intent, citing among other cases a decision of the Eleventh Circuit that one may be guilty of extortion by obtaining property for another. *Id.* at 364 (citing *United States v. Heimowitz*, 725 F.2d 1561, 1577 (11th Cir.), *cert. denied*, 469 U.S. 1072 (1984)). Self-evidently, that is a different point.

To be sure, the *Lewis* opinion also contained gratuitous dicta. The court went on to state that "the

defendant would have violated § 1951 if, for example, he had simply demanded that Johnson & Johnson burn $1 million in cash." 797 F.2d at 364. But this statement was unnecessary to the court's decision, and the court made no effort to reconcile this statement with the statutory language. The court did not try to explain how "obtaining" property possibly could mean causing the owner to destroy it.

In short, support for the construction of the Hobbs Act that the court of appeals applied in this case is thin and unreasoned. The lower court's decision in this case never explains how a person may "obtain" property of another, without receiving, acquiring, or taking it, or even causing the possessor to deliver it to a third person. The decision also is silent on how "property" may qualify as the object of extortion when, like the intangible right to conduct one's business or profession, it may be capable of being impaired but is incapable of being acquired by another. Further, the decision in this case does not rest upon any long-established understanding of the statute. On the contrary, the Seventh Circuit seems to have arrived at its view of the Hobbs Act unnecessarily and casually, without considered examination of the statutory language. *See also* Brian J. Murray, *supra*, 75 NOTRE DAME L. REV. at 718-19 (criticizing judicial expansion of offense of extortion as unreasoned and ahistorical).

Loosening of requirements for conviction under the Hobbs Act threatens to expand that statute beyond reason. The *Notre Dame Law Review* note points out that this loosening destroys the distinction between "extortion" and the common law crime of "coercion." *See id.* More broadly, it destroys the distinction between a larceny-type offense and a malicious destruction of property-type offense. If *both* the concepts of "obtaining" and "property of another" within the definition of extortion in 18 U.S.C. § 1951(b)(2) are loosened, then extortion under the Hobbs act will have become a general crime of violence. When any kind of property or liberty interest, loosely defined, is impaired, destroyed or damaged, then a Hobbs Act prosecution may lie, provided only that there is sufficient nexus with commerce. The range of cases that could lead to Hobbs Act prosecutions would expand enormously: A road-rage assault or even threat, if it interrupts interstate traffic; maliciously letting the air out of the tires of a neighbor's car, if it interferes with a morning commute; even a fight outside a bar at least if it keeps a patron from going inside; and countless other examples. All these now could become Hobbs Act violations. Such expansion of the statute is unjustified.

This is not to say that such acts should go unpunished. But the courts should not reach beyond the enacted language to turn such violations of state law into severely punished federal felonies. Without a clearer

statement from Congress that such acts should be prosecuted in federal court, and subject the offenders to 20 years in federal prison, they should not be deemed extortion within the meaning of the Hobbs Act.

## CONCLUSION

The decision of the court of appeals should be reversed. The definition of extortion within the Hobbs Act, 18 U.S.C. § 1951(b)(2), should be applied according to its actual terms, which require obtaining or taking property from another.

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